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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ANGEL SANTANA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Rule 11(e)(6) of the Federal Rules of Criminal Procedure and Rule 410 of the Federal Rules of Evidence provide that statements made in the course of plea discussions with an attorney for the government that do not result in a plea of guilty normally may not be admitted against the defendants who made the statements.

The question presented in this case is whether the government may, during its case-in-chief, use petitioner's uncounseled debriefing admissions where those admissions were made as a condition of petitioner being enrolled as a government informant in order that petitioner be provided an opportunity to avoid or forestall indictment?

The Court has granted certiorari in *United States v. Mezzanatto*, 998 F.2d 1452 (9th Cir. 1993), *cert. granted*, ___ U.S. ___, 114 S.Ct. 1536 (1994), to resolve a sharp circuit conflict concerning the admissibility *vel non* of debriefing or proffer statements as prior inconsistent statements. The *sine qua non* of this petition is whether the government may use the same type of statements during its case-in-chief.

CERTIFICATE OF INTEREST

The Petitioner, ANGEL SANTANA, is represented in these proceedings by Attorney Allan A. Ackerman, Esq., 2000 N. Clifton Avenue, Chicago, Illinois, 60614.

Neither petitioner nor counsel has any other interest nor represents any other party or interest in these proceedings.

Allan A. Ackerman

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UNITED STATES OF AMERICA,

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Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Angel Santana, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on May 20, 1994.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-6a) will not be reported in the Federal Reporter. The panel affirmation is unpublished.

JURISDICTION

The unpublished affirming opinion and judgment of the court of appeals were entered on May 20, 1994 (App., *infra*, 1a-7a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RULES INVOLVED

Rules 102 and 410, Fed.R.Evid.; and Rules 2 and 11(e)(6), Fed.R.Crim.P., are reproduced in the Appendix B to the petition (App., *infra*, 8a-9a).

STATEMENT

After a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of participating in a drug conspiracy in violation of 21 U.S.C. § 846.

Petitioner was sentenced to life immurement. The court of appeals affirmed, App., *infra*, 1a-7a.

1. On June 9, 1992, U.S. Customs Agent Victor Thompson (Thompson) spoke to a gentleman who identified himself as Frank, a friend of Mauro (Thompson's informant, Vol. 2-60, 61). Ironically, Frank was a federal fugitive calling from Cali, Columbia. *Id.* Frank wanted to introduce Thompson to someone who would be interested in purchasing seventy kilos of cocaine. Frank told Thompson that "Roke Julio" (Roke) or a woman named "Lamento" would contact Thompson.

2. On June 13, 1992, Thompson traded telephone calls with a male Hispanic identifying himself as Roke. *Id.* at 69. Eventually Thompson met Roke in the parking lot of a restaurant in Tampa, Florida. After fleeting introduc-

tions, Roke departed, claiming he would return. He did not. At trial, Roke was identified as petitioner. From June 13, 1992 forward Thompson had no further communication with petitioner.

3. On June 19, 1992, a woman identifying herself as Lamento reached Thompson. She explained (in substance) that the man Thompson spoke to a week earlier was very cautious and thought that Thompson was a "**feo.**"[1]

4. On June 22, 1992, Thompson met up with Lamento and her daughter in Tampa, Florida.[2] At Thompson's suggestion, the group journeyed to a government undercover warehouse where the parties engaged in a lengthy recorded conversation. Within the fabric of that conversation, Lamento frequently referred to "he"—an appellation the government ascribed to petitioner.

5. From June 22 to July 1, 1992, Thompson and Lamento had a total of fourteen recorded telephone conversations. On July 1, 1992 Lamento and others appeared at the government undercover warehouse to purchase some sixty kilos of cocaine.[3] All parties, save for petitioner, were arrested at the warehouse. Petitioner had departed Tampa hours prior to the late morning "buy-bust."

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[1] Spanish for agent or police officer, Vol. 2-101-103. Lamento also explained that the "Frank" of the original call on June 9, 1992 was her son-in-law. *Id.*

[2] Lamento turned out to be Anna Ruiz, one of petitioner's co-indictees. Ruiz was convicted in a separate trial and her direct appeal is pending in the U.S. Court of Appeals for the Eleventh Circuit. Alba Ruiz was a charged co-conspirator with her mother. She had the benefit of a judgment of acquittal at the close of the prosecution's case.

[3] A reverse buy.

6. Petitioner drove from Tampa to Miami. He pulled into the driveway of a home where he was arrested by the F.B.I.

7. Trial evidence revealed that petitioner, pursuant to an agreement entered into with the F.B.I. and approved by the Office of the United States Attorney, became an active government informant on or about August 20, 1991 (Vol. 4-167-183). The agreement stated:

> "To Angel Santana: Pursuant to my discussion with Assistant United States Attorney Phillip D. DeRosa on August 21st and August 22nd, 1991, the United States Government promises to you that information you provide to me, Special Agent Scott Weigmann, will not be used against you in any type of prosecution unless and only if you are arrested during your period of cooperation with the United States Government for your involvement in current criminal activity which was not at the direction of the F.B.I."[4]

Petitioner understood his informant agreement meant that everything he did before was "kind of forgiven . . . something like that," Vol. 5 at 29. Agent Weigmann demanded, as a condition of informant enrollment, that petitioner confess his past sins. Those past sins included petitioner dealing drugs in Chicago, Philadelphia and elsewhere to the tune of hundreds of kilos of cocaine over a decade. Petitioner, while recounting his past misconduct, named certain past confederates. Those confederates included some of petitioner's co-conspirators in the July 29, 1992 federal conspiracy indictment.

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[4] The agreement was dated August 22, 1991 and signed by petitioner and F.B.I. Agent Scott Weigmann, Vol. 4-167-168. *Inter alia*, agent Weigmann testified that he promised to bring petitioner's cooperation to the attention of the U.S. Attorney's Office—and it might avoid or forestall an indictment against petitioner, Vol. 4-166.

8. Information supplied by the petitioner had led to several arrests and the seizure of sixteen kilos of cocaine in September, 1991. *Id.*, 181-183. Within the same time frame, petitioner, in the company of federal agents, journeyed to Puerto Rico in an effort to substantiate information regarding a substantial cocaine enterprise that was shipping multiple kilo quantities of cocaine into Florida by using ships with false bottoms.[5] Petitioner, as a federal informant, had agreed to testify against the persons arrested based on information he supplied, Vol. 5 at 40-45.

9. On July 19, 1992, petitioner and others were charged in a single count indictment based upon the "buy-bust" events which took place from June 9 to July 1, 1992.

Petitioner's trial was severed predicated on a pre-trial notification of petitioner's Public Authority Defense, Vol. 1-44, 46.[6] During petitioner's trial, over objection, a government witness was allowed to testify to the multiple acts of misconduct by petitioner per petitioner's "confession" to agent Weigmann. During the government's rebuttal summation, government counsel characterized petitioner's agreement as providing "use immunity" (Vol. 6-52).

Petitioner's separate jury trial concluded on December 7, 1992 with the return of a guilty verdict and on February 24, 1993 petitioner was sentenced to life immurement.

10. The affirming panel interpreted petitioner's agreement with the government as an agreement:

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[5] Vol. 5-39-42.

[6] Rule 12.3, Fed.R.Crim.P., mandates that a defendant relying on a Public Authority Defense must give notice in advance of trial.

> grant[ed] "conditional use immunity" with respect to any statements made to the F.B.I. in his debriefings. There is no evidence to suggest that the F.B.I. had directed Santana to participate in the conspiracy which culminated in the July 1, 1992, sting operation and arrest. Santana's arrest for non-approved criminal activity voided his use immunity agreement.

The affirming panel failed to calibrate Rules 11(e)(6), Fed.R.Crim.P., or Rule 410, Fed.R.Evid., into the analytical framework (i.e., whether uncounseled disclosures of prior uncharged criminal conduct could be admitted against petitioner where those compelled disclosures were a condition of the informant agreement).

REASONS FOR GRANTING THE WRIT

In *United States v. Mezzanatto*, 998 F.2d 1452 (9th Cir. 1993),[7] the Court granted certiorari to resolve the admissibility *vel non* of proffer or debriefing statements as prior inconsistent statements. This petition carries the question a step further. At bar, the government was allowed to elicit, over objection, during its case-in-chief, uncounseled debriefing admissions made by petitioner.

Petitioner, absent counsel, entered into an informant agreement on August 22, 1991. That agreement was approved by an attorney for the government. Pursuant to that agreement, petitioner provided information which led to the seizure of sixteen kilos of cocaine and the arrest of at least three persons. Petitioner also travelled to Puerto Rico in the company of federal agents in an effort to further an investigation involving the importation of several

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[7] Certiorari granted on April 18, 1994, 114 S.Ct. 1536 (1994).

hundred kilos of cocaine where the importation was accomplished through the use of ships that had false bottoms.

During petitioner's trial, the government was allowed to present, over defense objection, testimony within its *case-in-chief* outlining the admissions made by petitioner during his debriefings. *Inter alia*, the government presented petitioner's debriefing admissions that he had engaged in drug-related misconduct with each of the co-indictees years earlier.[8]

1. In *United States v. Mezzanatto* the government urged that the Court resolve the split-in-circuits concerning the contours of Rules 410 and 11(e)(6). The government's position mirrors the stance taken by the Seventh Circuit, *viz.* The execution of the agreement constitutes a waiver and thus statements made during debriefings that are inconsistent with later trial testimony may be used for impeachment.[9] In *Mezzanatto*, a divided Ninth Circuit panel barred the admission of inconsistent statements made by *Mezzanatto* during a proffer session which preceded *Mezzanatto*'s trial. In *Mezzanatto*, the government utilized, under cross-examination, *Mezzanatto*'s inconsistent statements during a proffer session.

2. Petitioner, absent counsel, executed an agreement at a point in time when a federal agent told him that he

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[8] Vol. 4-176-179. Co-indictees in the case-at-hand included Mr. Aviles and Anna Ruiz (Lamento). Petitioner implicated both as accomplices in multi-kilo drug deals dating back to the early 1980s. *Id.*

[9] In *United States v. Dortch*, 5 F.3d 1056, 1067-68 (7th Cir. 1993), the Seventh Circuit concluded that general waiver considerations applied and thus the court declined to bar the admission of the inconsistent statements made during a pretrial proffer session, petition for certiorari pending, *sub nom. Suess v. United States*, No. 93-7218 (filed December 20, 1993).

was a candidate for indictment, Vol. 4-164-166.[10] Petitioner also executed standard F.B.I. forms allowing the recordation of his conversations, Vol. 4-170. The F.B.I. agent told petitioner that as a pre-condition to any agreement petitioner had to re-count his past sins. Petitioner candidly told the government of his prior uncharged offenses, while including the names of his erstwhile accomplices, Vol. 4-176-178. The government utilized petitioner's uncounseled debriefing admissions not only during their case-in-chief, but, as probative evidence of petitioner's indictment-guilt during summations, Vol. 4-175-178; Vol. 6 at 12-13, 51-52.[11]

3. The Court may juxtapose the Ninth Circuit opinion in *United States v. Mezzanatto* and the Seventh Circuit opinion in *United States v. Lortch* with the case-at-hand. Here, the Eleventh Circuit finds an absolute waiver to the point where the debriefing admissions are admitted—not to demonstrate one or more prior inconsistent statements after the defendant testified, but rather, **as substantive admissions** employable during the government's case-in-chief.

4. In combination, Rules 410 and 11(e)(6) prohibit the admission of the statements made by petitioner within the contours of the case-at-hand. While the decision below in *United States v. Mezzanatto* clearly supports the granting of relief at bar, there is no reported opinion which allows the unfettered introduction of uncounseled proffers

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[10] On August 20, 1991 in Miami, Special Agent Weigmann of the F.B.I. confronted petitioner and advised him that he could avoid or forestall an indictment if he became a government informant. *Id.*

[11] During the government's summation reference was made to petitioner's debriefing admissions which included identifying petitioner's current indictee co-conspirators as his erstwhile accomplices in unrelated drug misconduct going back to the 1980s.

or debriefing statements in violation of Rules 410 and 11(e)(6), during the presentation of the government's case-in-chief.[12]

5. Brevity seems the more reasonable approach given the conflicting cases before the court in *Suess v. United States*, No. 93-7218 and *United States v. Mezzanatto*, *cert. granted*, 114 S.Ct. 1536 (1994). Each petition and the *Mezzanatto* briefs offer extensive analytical undergirdings to both Rules 410 and 11(e)(6).

The Eleventh Circuit approach, judging from the case at hand, finds an absolute waiver. Hence, the Eleventh Circuit clearly clashes with the Ninth Circuit (and arguably with the Seventh Circuit).

CONCLUSION

In *United States v. Mezzanatto* the government urged review because the issue is of substantial importance to

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[12] See *United States v. Verdoorn*, 528 F.2d 103, 107 (8th Cir. 1976) ("[m]eaningful dialogue between the parties would, as a practical matter, be impossible if either party had to assume the risk that plea offers would be admissible in evidence"); but see, *United States v. Cunningham*, 723 F.2d 217, 227-28 (2nd Cir. 1983), *cert. denied*, 446 U.S. 951 (1984) (suggesting that statements made by a defendant during a conference with government counsel would be admissible without restriction where the court found that the meeting was not . . . "a plea bargaining conference but an effort by [the defendant] to convince the government that he was not guilty of any crime").

the federal criminal justice system (Government's cert. pet in *Mezzanatto* at pg. 8). Petitioner agrees.

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

[DO NOT PUBLISH]

[Filed May 20, 1994]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-2221
Non-Argument Calendar

D.C. Docket No. 92-213-CR-T-15B

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ANGEL SANTANA, a/k/a Roke Julio,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(May 20, 1994)

Before KRAVITCH, BIRCH, and CARNES, Circuit Judges.

PER CURIAM:

Angel Santana was convicted of conspiracy to possess with intent to distribute more than five kilograms of cocaine in violation of 21 U.S.C. § 846. The district court

sentenced Santana to the statutory minimum of life imprisonment. On direct appeal, Santana raises four issues.

Santana first argues that the evidence adduced at trial was insufficient to support his conviction. At trial, Agent Thompson, an undercover Customs agent, testified that Ana Ruiz, one of Santana's coconspirators, had expressly told him that "Roke Julio [Santana's alias] was her boss and the money man. She told me . . . the money [for the drug deal] was coming from Roke Julio, the man who had met me at that parking lot and who had gone back." In opening argument, Santana's counsel conceded that Santana "as Roke Julio" had met Thompson at the parking lot in question. The jury was entitled to credit Thompson's testimony. Furthermore, FBI Agent Steve Wiegmann testified that Santana confessed his involvement in the conspiracy upon his arrest. There was also evidence that Santana was at the site of the July 1, 1992, sting operation in Tampa but departed precipitously when he spied a government surveillance team. On appeal, we construe the evidence in the light most favorable to the government. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979) Taken as true, a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.*

Second, Santana maintains that his August 22, 1991, agreement to become a confidential FBI informant precluded the government's introduction of statements made by Santana during a debriefing about his earlier drug activity. Santana's written informant agreement with the FBI must be interpreted according to the "basic principles of contract law." *United States v. Weaver*, 905 F.2d 1466, 1472 (11th Cir. 1990). "Contract interpretation, generally a question of law, is subject to *de novo* review on appeal."

Zaklama v. Mt. Sinai Medical Center, 906 F.2d 650, 652 (11th Cir. 1990). The signed agreement provided:

> Pursuant to my discussion with [AUSA] Phillip D. DeRosa on August 21st and August 22nd, 1991, the United States Government promises to you that information you provide to me, Special Agent Scott Wiegmann, will not be used against you in any type of prosecution unless and only if you are arrested during your period of cooperation with the United States Government for your involvement in current criminal activity which was not at the direction of the FBI.

We agree with the district court that the only reasonable interpretation of the agreement FBI Agent Scott Wiegmann and Santana signed in August 1991 is that any information provided by Santana to Wiegmann would not be used against him unless Santana was arrested, during the period of his cooperation, for criminal activity not approved by the FBI. [R4-173]. In other words, Santana was granted conditional use immunity with respect to any statements made to the FBI in his debriefings. There is no evidence to suggest that the FBI had directed Santana to participate in the conspiracy which culminated in the July 1, 1992, sting operation and arrest. Santana's arrest for non-approved criminal activity voided his use immunity agreement.

Third, Santana argues that statements made by him during debriefings with Wiegmann were extrinsic act evidence barred under either Rule 403 or 404(b). We agree that Santana's informant contract was not a waiver of the Federal Rules of Evidence, and in particular of Rule 404(b), which prohibits the introduction of extrinsic act evidence to establish a person's character in order to show that the person acted in conformity with that character

on a given occasion. In this case, the 404(b) testimony included statements Santana made to Agent Wiegmann, during his debriefings, about the prior drug trafficking activity of several of Santana's coconspirators, Santana's own prior involvement in the drug trade, and the relationship between Santana's drug endeavors and those of some of the coconspirators. It was not error to admit the statements concerning the coconspirators and the fact that Santana had previously engaged in drug transactions with certain of them. These statements show that prior to the July 1, 1992, sting operation Santana had knowledge that the coconspirators were involved in the drug trade.

In any event, any error in admitting Santana's statements concerning his own prior drug trafficking would be harmless beyond a reasonable doubt. Santana's counsel informed the jury in his opening statement:

> Mr. Santana, ladies and gentlemen, was a drug dealer. That is how he basically made his living, and he was a very good, I suppose, for lack again of a better word, a pretty good drug dealer. In other words, his business was a lucrative business. I will tell you from the outset that he made a lot of money, of course, dealing illegally in drugs.

In view of that opening concession, the later admission of Agent Wiegmann's testimony that Santana told him he had previously sold approximately 400 kilograms of cocaine bought from the coconspirators in this case was harmless.[1]

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[1] In his Reply Brief, Santana argues that the government failed to give him or the district court notice that it intended to introduce 404(b) evidence. *See* Fed. R. Evid. 404(b). Santana did not raise this argument below, and the lack of notice, if any, does not rise to the level of plain error.

Fourth, Santana argues that the prosecutor impermissibly vouched for the credibility of two key government agents who testified against Santana and that the prosecutor improperly invited the jury to serve as the conscience of the community. Having reviewed the transcript, we conclude that this claim is without merit. First, at no point did trial counsel object to the government's alleged "vouching"; we therefore review for plain error. Second, the prosecutor's remarks at Santana's trial did not intimate that he believed in the veracity of the agents on the basis of evidence not in the record. *See United States v. Eyster*, 948 F.2d 1196, 1206 (11th Cir. 1991) (expressing concern that "[a] jury could reasonably believe the prosecutor's indications if the prosecutor either places the prestige of the government behind the witness, by making explicit personal assurances of the witness' veracity by indicating that information not presented to the jury supports the testimony"). Instead, the prosecutor invited the jury to consider "who has the motive to tell you something other than the truth?" Third, the prosecutor's remarks were a direct response to Santana's assertion in closing argument that the agents *had* a motive to lie. No plain error occurred.

Finally, Santana complains that the government improperly invited the jury to serve as the conscience of the community when passing judgment. "[A]ppeals to the jury to act as the community conscience are not per se impermissible" unless "calculated to incite the passions and prejudices of the jurors." *United States v. Solivan*, 937 F.2d 1146, 1151 (6th Cir. 1991). Here, the prosecutor, in response to a comment made by Santana's counsel in closing argument, reminded the jury that it should not consider whether "Mr. Santana could somehow somewhere be prosecuted for other crimes." He then added, "I ask

you to do your job, do your duty, as citizens of the Middle District of Florida, and [to] decide this case based on the evidence in this case not what might be or could be or could possibly happen at some point in the future." Santana's counsel did not object to this statement at trial, and its admission certainly does not constitute plain error. The prosecutor's comment resembles the judge's charge, which admonished the jury to consider only the evidence presented in the case and the inferences which common sense allowed them to make from that evidence. The prosecutor's comments can hardly be understood as anything more than a request that the jurors do their civic duty to judge the case on the facts presented. There was no error, much less plain error.

Santana's claims being without merit, his conviction is AFFIRMED.

[Filed May 20, 1994]

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-2221
Non-Argument Calendar

D.C. Docket No. 92-213-CR-15B

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ANGEL SANTANA, a/k/a Roke Julio,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

Before KRAVITCH, BIRCH and CARNES, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of conviction of the said District Court in this cause be and the same is hereby AFFIRMED.

Entered: May 20, 1994
For the Court: Miguel J. Cortez, Clerk

By: /s/ MATT DAVIDSON
Deputy Clerk

ISSUED AS MANDATE: JUNE 24, 1994

APPENDIX B

Rule 102, Fed. R. Evid., provides:

Purpose and Construction

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Rule 410, Fed. R. Evid., provides:

Inadmissibility of Pleas, Plea Discussions, and Related Statements

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) a plea of guilty which was later withdrawn;

(2) a plea of nolo contendere;

(3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which did not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussion has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

Rule 2, Fed. R. Crim. P., provides:

Purpose and Construction

These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

Rule 11(e)(6), Fed. R. Crim. P., provides:

(6) Inadmissibility of Pleas, Plea Discussions, and Related Statements. Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(A) a plea of guilty which was later withdrawn;

(B) a plea of nolo contendere;

(C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or

(D) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.